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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

David Allen Harbour,

Defendant.

No. CR-19-00898-PHX-DLR

**RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS
FORFEITURE COUNT AS IT RELATES
TO ALLEGED INVESTOR-VICTIM
“R.G.” (Doc. 98)**

The United States, through undersigned counsel, files this Response in Opposition to Defendant’s Motion to Dismiss the Forfeiture Count as it Relates to Alleged Investor-Victim “R.G.” (Doc. 98.) and respectfully requests that the Court deny the motion without a hearing.

SUMMARY OF ARGUMENT

David Allen Harbour’s (“Harbour”) motion to dismiss is unavailing and should be denied for several reasons. *First*, despite allegations of an attempt “to smuggle an impermissible and unrelated fraud claim into the indictment,” the government’s inclusion of R.G.’s transaction in the forfeiture claim is proper because the funds are involved with the claims alleged in the indictment. *Second*, because R.G. has been

both directly and proximately harmed by the scheme charged in the Indictment, R.G. is a “victim” entitled to restitution through a process known as remission and restoration. *Third and importantly*, Harbour’s scheme to defraud R.G. is within the five-year statute of limitations because he engaged in additional instances of wire fraud with “lulling” text messages late into 2015. Bottom line, no government impropriety has occurred in this situation, and the Court should reject Harbour’s claims.

RELEVANT FACTS

A. Harbour Defrauds R.G.

Harbour is being charged with wire fraud in violation of 18 U.S.C. § 1343 in Counts 1-3 and transactional money laundering in violation of 18 U.S.C. § 1957 in Counts 4-22 as a part of a larger investment fraud scheme. (Doc. 3 at 6-7.) The overarching scheme involved setting up LLC’s with victims to facilitate payday loan investments and gross misrepresentations of material facts to his investors. (Doc. 3 at 4).

In January of 2010, during a time of financial difficulty for R.G., Harbour was introduced to R.G. as a person who could solve her financial problems. (Def.’s Mot. to Dismiss, Ex. 1 at 3.)¹ In a February 2015 meeting, Harbour assured R.G. that he could help her through investments, investment protection, negotiations, and strategizing. (Def.’s Mot. to Dismiss, Ex. 1 at 4.) In March, Harbour and R.G. officially began doing business together. (Ex. A at 2.) Harbour promised to provide “services” to R.G., including designing a legal entity for her (such as an LLC), assisting with financial products, and providing cash flow investments. (Ex. A at 3.) Subsequently, R.G. signed over a \$1,001,242.67 check from her late husband’s life insurance proceeds to Harbour’s company, High Point Capital Group, LLC. (Ex. A at

¹ Ex. 1 attached to Harbour’s motion was a timeline prepared by R.G. that detailed interaction with Harbour during the course of the fraud. It was prepared for a civil case filed by R.G. against Harbour. *See R.G. v. David Harbour, et. al.*, CV2018-054740 (Maricopa County Superior Court).

1 2.)

2 Sadly, Harbour would not fulfill his promises and return R.G.'s money. From
3 the time the check was signed over to Harbour through October of 2016, Harbour
4 frequently misled R.G. about her funds. Often, when R.G. requested money from her
5 funds, he told her it was inaccessible because it could not be attained from whatever
6 investment it was in at the time. (Def.'s Mot. to Dismiss, Ex. 1 at 30, 38, 43.)
7 Frequently, Harbour indicated that R.G.'s funds were involved with his overarching
8 investment scheme. On August 20, 2012, Harbour confirmed with R.G. that her
9 money was set aside in one of his investments. (Def.'s Mot. to Dismiss, Ex. 1 at 30.)
10 Again, on July 9, 2015, Harbour indicated R.G.'s money was involved in his scheme
11 in a text message saying, "Sounds good. I'm boarding a plane. One of my investors is
12 also in the same deal you are."² On September 3, 2015, Harbour tells R.G. that her
13 money is "off shore" and that he is doing the same thing with her money that he does
14 to help protect "other clients" from creditors. (Def.'s Mot. to Dismiss, Ex. 1 at 39.)
15 Additionally, on January 14, 2016, Harbour again indicated that R.G.'s funds were
16 "commingled" with other investors deals and that he would "get a line of credit" on
17 the investments to provide R.G. with money. (Def.'s Mot. to Dismiss, Ex. 1 at 43.)
18 Harbour also left R.G. several voicemails confirming appointments. The sad truth is
19 that Harbour consistently had the funds to repay R.G., which is evident by his
20 \$7,257,601.67 of AMEX payments from 2010 to 2016.³

21 **B. Additional Victims**

22 Following Harbour's arrest and indictment in August of 2019, additional
23 victims have come forward claiming that Harbour made certain promises about the
24 nature of their investment with him. Among other things, further investigation has

25 ² R.G.'s phone was examined by federal investigators and numerous text messages
26 and voicemails from Harbour related to the subject funds were extracted.

27 ³ See AMEX statements; HARBOUR-023841:HARBOUR-025946 (January 2009
28 – August 2017).

determined that a considerable amount of investors' funds were diverted for Harbour's personal expenses. Typically, Harbour would be subject to a superseding indictment that would add additional counts and victims. Unfortunatley, the COVID-19 pandemic has caused the grand juries in the District of Arizona to suspend operation for the foreseeable future.⁴

ARGUMENT

1. Because R.G.'s Money was involved in Harbour's scheme, the government may include R.G.'s transaction in the forfeiture claim.

It is proper for the government to seek forfeiture of property if it has "established the requisite nexus between the property and the offense" charged. Fed. R. Crim. P. 32.2(b)(1)(A). Here, to establish the requisite nexus, all that must be shown is that Harbour obtained R.G.'s money as a result of his offenses alleged in the indictment. *See* 18 U.S.C. §§ 981(a)(1)(C), (a)(2)(A) (2018); *see also United States v. Lo*, 839 F.3d 777, 793 (9th Cir. 2016) ("Because the proceeds from a mail fraud or wire fraud offense include funds obtained 'as the result of the commission of the offense,' and the commission of such a mail fraud or wire fraud offense necessarily includes a fraudulent scheme as a whole, the proceeds of the crime of conviction consist of the funds involved in that fraudulent scheme, including additional executions of the scheme that were not specifically charged or on which the defendant was acquitted.")

In short, in the wire fraud offenses charged in Counts 1-3, the requisite nexus is established between the funds that derived from uncharged conduct and the wire fraud scheme if the funds are "involved in [the] fraudulent scheme." *See Lo*, 839 F.3d at 793 (citing *United States v. Capoccia*, 503 F.3d 103, 117-18 (2d Cir. 2007)); (Doc. 3 at 6.)

⁴ *See* GO 20-27 extending GJ suspension until further notice.

1 a. Additional instances of Wire Fraud

2 Since the original indictment, federal investigators have uncovered additional
3 instances of wire fraud committed by Harbour against R.G (and other victims, for that
4 matter). For example, Harbour engaged in the following text messages providing
5 various excuses as to why he has failed to provide R.G. with her requested funds:

- 6
- 7 • 07/07/2015 (pg. 32): “Ok. Traveling a lot. I’m waiting for funds”.
 - 8 • 07/08/2015 (pg. 33): “I’m on it darling”.
 - 9 • 07/09/2015 (pg. 35): “Waiting on them. Paper work is more detailed with our
10 president ”.
 - 11 • 07/09/2015 (pg. 36): “Sounds good. I'm boarding a plane. One of my big
12 investors is also in the same deal you are”.
 - 13 • 07/13/2015 (pg. 37): “The banks had a wire cut in the middle of the ocean. It's
14 been all over the news. I will send you the email from them”.
 - 15 • 07/24/2015 (pg. 38): “I love you. We have to get the money in the right way so
16 alarms go off”.
 - 17 • 08/02/2015 (pg. 40): “Ok. Your money will come when it is released. It's the
18 nature of the beast. It is protected like you want, but that also means it is a slow
19 process”.
 - 20 • 08/11/2015 (pg. 45): “Hey you, sorry I haven't gotten back to you. I'm deep in this
21 hedge fund. Don't ever worry about us, I love you!!”.
 - 22 • 08/14/2015 (pg. 47): “I'm buried with this hedge fund in NY. Promise I will call
23 you. I have always been there for you. I have to get this deal closed. It's a 25m
24 facility”.
 - 25 • 08/14/2015 (pg. 48): “Don't worry”.
 - 26 • 08/24/2015 (pg. 49): “I called you back Friday. I'm waiting to hear from the
27 banker”.
 - 28 • 09/03/2015 (pg. 53): “Love you too. It will be okay”.

- 1 • 09/25/2015 (pg. 56): “Waiting on them”.
- 2 • 11/13/2015 (pg. 59): “I will! Sorry. I'm just juggling the world.”
- 3 • 11/30/2015 (pg. 61): “Cool. U will call you abs let's meet when you are back.
- 4 Don't worry!!”.⁵

5 Finally, according to R.G.’s timeline, on December 17, 2015, she is escorted out
6 of Harbour’s office when she demanded the return of her money. (Doc. 98; Ex. 1 at 3.)
7 On September 23, 2016, R.G. had her last contact with Harbour. (*Id.*)

8 Here, Harbour continued his fraudulent scheme until September, 2016, long
9 after R.G. provided him with her funds totaling \$1 million in 2010. Specifically,
10 Harbour used his cell phone to leave both text messages and voicemails providing false
11 explanations regarding the status of R.G.’s funds or otherwise furthering his scheme
12 to obtain her money and use it for his own personal expenditures. These explanations
13 futhered his fraudulent scheme because they were designed to delay any referral to
14 authorities by providing R.G. with a false sense of security that her funds were safe
15 and available. *United States v. Lane*, 474 U.S. 438, 451-52, (1986) (“Terry Griffith's
16 assurances of payments that were never forthcoming furthered the scheme by
17 providing Symphonic with a ‘false sense of security, thereby postponing any premature
18 interference with the scheme.’”).

19 Lastly, Harbour’s use of his telephone within the statute of limitations are additional
20 instances of wire fraud. *United States v. Oulfield*, 859 F.2d 392, 400 (6th Cir.1988) (“As
21 long as the fraudulent scheme has not been put to ultimate rest, the communication ‘will
22 support a conviction even if it follows the defendant's fraudulent acts, or occurs after the
23 schemers have obtained the victim's money or goods.’”).

24 b. R.G.’s funds are subject to forfeiture from Harbour.

25 To show that the funds are involved in the fraudulent scheme, the government
26 need only prove its involvement by the preponderance of the evidence standard. *See*

27 ⁵ The text messages were recently extracted from R.G.’s phone and are in the
28 process of being disclosed.

1 *United States v. Cox*, 851 F.3d 113, 129 (2017) (holding that the preponderance of the
2 evidence standard applies to criminal forfeiture because it is part of the sentence rather
3 than the substantive offense); *see also United States v. Hasson*, 333 F.3d 1264, 1277
4 (11th Cir. 2003) (holding that criminal forfeiture is a part of sentencing and that the
5 preponderance of the evidence standard applies); *accord Copaccia*, 503 F.3d at 116.

6 Additionally, despite Harbour's claim that the timing of R.G.'s transaction
7 prohibits the funds' forfeiture, funds related to uncharged conduct can be subject to
8 forfeiture even if the conduct predates the offenses actually charged. *See Capoccia*,
9 503 F.3d at 115-18. In *Capoccia*, the Second Circuit held that property derived from
10 a defendant's uncharged offenses that occurred prior to the charged offenses were
11 not subject to forfeiture. *Id.* at 118. It did so because the defendant's crime of
12 conviction was "not for a scheme, conspiracy, or enterprise" and prohibited only
13 "individual instances of transferring stolen money." *Id.* However, the court
14 emphasized that crimes prohibiting "a scheme" can include forfeiture of funds derived
15 from uncharged offenses involved in the scheme because "the overall scheme is thus
16 inherently part of the offenses" that the defendant is charged with. *Id.* at 117. In doing
17 so, the court indicates that as long as the money stemming from uncharged conduct is
18 involved in the overarching scheme of the charged conduct, the timing the conduct
19 occurred is irrelevant, and the requisite nexus for criminal forfeiture is still met.

20 Here, even though the charged conduct occurred after Harbour obtained R.G.'s
21 money, the preponderance of the evidence clearly establishes that R.G.'s funds were
22 involved in the overarching wire fraud scheme. Counts 1-3 took place from July 30,
23 2014, to August 11, 2015. The scheme at issue includes Harbour's intent to defraud
24 and obtain money from investor-victims by using materially false and fraudulent
25 representations and by concealing material facts to his clients. The reality is, during
26 the period the conduct alleged in Counts 1-3 occurred, R.G. was making urgent and
27 unsuccessful requests to obtain her money from Harbour. Additionally, Harbour
28 himself implicated R.G.'s money within his scheme multiple times, including in a text

1 message sent on July 9, 2015, that stated, “Sounds good. I’m boarding a plane. One of
 2 my big investors is also *in the same deal* as you are.” The reality is this: R.G.
 3 repeatedly asked for money for her parents’ home during the relevant time period to
 4 no avail. In fact, Harbour indicated that he was trying to figure out where to show the
 5 money coming from. In another instance, Harbour also indicated that R.G.’s funds
 6 were a part of his payday lending scheme by telling R.G. that her funds were
 7 commingled with three other clients and that “his buddies have creditors at 900k of
 8 [the money]” but that he would get a “line of credit against that money” to get R.G.
 9 money that she needed. As Harbour made all these statements, he had the means to
 10 provide R.G. with the money that she needed, which is indicated by his substantial
 11 AMEX payments from 2010-2016.

12 Accordingly, both Harbour’s avoidance of R.G. during the relevant time period
 13 and R.G.’s funds at issue were most likely involved in Harbour’s scheme to defraud
 14 his investor-victims for his own personal gain. Thus, the requisite nexus between
 15 R.G.’s funds and Counts 1-3 has been met, and Harbour’s motion should be denied.

16 **2. Contrary to Harbour’s argument that including R.G. on the indictment**
 17 **wrongfully punishes him for conduct past the statute of limitations, seeking**
 18 **asset forfeiture for R.G.’s funds simply punishes him for his fraudulent**
 19 **scheme accounted for in Counts 1-3.**

20 Criminal Asset Forfeiture is an element of sentencing imposed for the
 21 conviction of a crime—not a way to circumvent the Statute of Limitations. *See Libretti*
 22 *v. United States*, 516 U.S. 29, 38-39 (1985). It is not a part of the substantive offense;
 23 rather, it is punishment for the convicted offense. *See Libretti*, 516 U.S. at 39; *see also*
 24 *Cox*, 851 F.3d at 129. As discussed in depth earlier, a charge of wire fraud includes
 25 the scheme in its entirety—not just those charged. *Lo*, 839 F.3d at 793. Consequently,
 26 echoing the fact that the scheme likely involved R.G., asset forfeiture is simply part of
 27 Harbour’s potential sentence for his scheme to defraud others and in no way
 28 circumvents his due process rights protected by the statute of limitations.

1 **3. Because R.G. was directly and proximately harmed by Harbour’s scheme,**
2 **she is rightfully labeled a “victim” of his alleged crimes.**

3 A “victim” of a crime involving “a scheme” as an element includes “any person
4 directly harmed by . . . the criminal conduct” done “in the course of the scheme.” 18
5 U.S.C. § 3663(A)(2) (2018). This occurs when there is a causal link between conduct
6 done in the scheme and the harm inflicted on the individual. *United States v. Thomsen*,
7 830 F.3d 1049, 1067 (9th Cir. 2016).

8 Here, R.G. is clearly a victim of Harbour’s alleged crimes. Harbour’s scheme
9 involved blatant misrepresentations of all material operations of his company. During the
10 course of this scheme, Harbour withdrew over \$50,000 from “High Point Capital
11 Group LLC,” which is where he originally put R.G.’s funds. *See* (Ecf. No. 3 at 8;)
12 (Def.’s Mot. to Dismiss, Ex. 1 at 5-6.) At the same time, R.G. unsuccessfully asked
13 Harbour for her money so that she could purchase her parents’ home that had been in
14 the family for 100 years. (Def.’s Mot. to Dismiss, Ex. 1 at 5-6.) Ultimately, R.G.
15 ended up losing the funds she was promised would be returned. If not for his scheme,
16 R.G. may have been able to avoid substantial economic hardship and recovered her
17 money from Harbour. Lastly, it is unclear if Harbour has any money or assets to be
18 forfeited. Nevertheless, a money judgment will allow the United States to seek
19 forfeiture of any funds traceable to his fraudulent scheme (or substitute assets) and
20 restore those funds to the victims.⁶

21
22 ⁶ A victim may be granted remission of the forfeiture of property if the victim
23 satisfactorily demonstrates that: (1) a pecuniary loss of a specific amount has been directly
24 caused by the criminal offense, or related offense, that was the underlying basis for the
25 forfeiture, and the loss is supported by documentary evidence including invoices and
26 receipts; (2) the pecuniary loss is the direct result of the illegal acts and is not the result of
27 otherwise lawful acts that were committed in the course of the criminal offense; (3) the
28 victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind
 manner towards the commission of the offense, or related offense, that was the underlying
 basis for the forfeiture; (4) the victim has not in fact been compensated for the wrongful
 loss of the property by the perpetrator or others; and (5) the victim does not have recourse
 reasonably available to other assets from which to obtain compensation for the wrongful
 loss of the property. 28 C.F.R. § 9.8(a).

1 **CONCLUSION**

2 In sum, because R.G.'s funds were involved in Harbour's overarching scheme,
3 R.G. was directly harmed as a result of the scheme, and wire communications are
4 within the statute of limitations, it is proper to include R.G. in the indictment and to
5 seek forfeiture for R.G.'s funds. Accordingly, Harbour's motion should be denied
6 without ordering a hearing.

7 Respectfully submitted this 31st day of July, 2020.

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District of Arizona

10 s/ Kevin Rapp
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18 **CERTIFICATE OF SERVICE**

19
20 I hereby certify that on this 31st day of July, 2020, I electronically transmitted the
21 attached document to the Clerk's Office using the CM/ECF System for filing and a copy
22 transmitted to the following CM/ECF registrant:

23
24 Alan Baskin, Esq.
Attorney for Defendant

25
26 s/ Joy Faraj
27 U.S. Attorney's Office
28